

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2015AP1347-CR
2015AP1348-CR**

**Cir. Ct. Nos. 2013CF2641
2013CF3377**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARGARITO J. HERNANDEZ,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Margarito Juan Hernandez appeals two judgments of conviction, one entered upon his guilty plea to burglary while armed as a party to a crime, the other entered after a jury found him guilty of possessing an electric

weapon. He also appeals orders denying him postconviction relief. He contends his trial counsel was ineffective at sentencing by failing to impeach the credibility of one of the burglary victims who spoke at the proceeding. He further contends the circuit court erroneously denied him an evidentiary hearing to air his claim. We reject his contentions and affirm.

BACKGROUND

¶2 According to the criminal complaint filed in Milwaukee County case No. 2013CF3377, Hernandez and two co-actors broke into J.R.-R.'s home late at night on July 21, 2013. J.R.-R., her two young daughters, and her seventeen-year-old son, R.C., were all in the home at the time.

¶3 A police report dated a few days after the incident includes descriptions of statements that R.C. and J.R.-R. gave at the scene. According to police, R.C. said that three gunmen burst into his room, pointed their guns at him, and demanded drugs and money. As to J.R.-R., the police report provides:

[she] estimated that it was around 11:30 p.m. when an unknown [h]ispanic [m]ale came into her bedroom [and] pointed a handgun at her and her daughters. ... [He] told her something to the effect of, I'm looking for a guy because he stole \$15,000.00 and some drugs from me and he put a gun to my daughter's head....

[A] different [h]ispanic [m]ale then came into the bedroom and asked what happened, and the other [h]ispanic [m]ale who had been in the bedroom left. J.R.-R. indicated that the [h]ispanic [m]ale who was now in the bedroom told her not to worry, that he wasn't going to hurt her or her babies, and asked her where her phone was.... J.R.-R. indicated that the [h]ispanic [m]ale then grabbed her purse and took everything out of it, then he opened the closet doors and looked through the closet.... This [h]ispanic [m]ale then got a phone call....

J.R.-R. described the person who received the telephone call as having a red and black tattoo on his chest.

¶4 In a supplemental police report, an officer described showing photo arrays to J.R.-R. and R.C., who both selected Hernandez as one of the burglars. J.R.-R. further specified that Hernandez was the man who entered her bedroom and remained there with her and her children.

¶5 In due course, Hernandez pled guilty to armed burglary as party to a crime, acknowledging that he was the tattooed intruder. During the plea hearing, Hernandez denied that he carried a gun during the incident, stating that only his two accomplices had weapons. In response to an inquiry from the court about his co-actors' motives, Hernandez said "they didn't really explain it to me.... They said why they were going in but they didn't say why, what they were going to take or what they were gonna do." Under further questioning, however, Hernandez eventually acknowledged that he "knew they were going to go in and take some drugs" and that he was "prepared to help."

¶6 On the same day that Hernandez entered his guilty plea to armed burglary, a jury found him guilty in Milwaukee County case No. 2013CF2641, convicting him of possessing an electric weapon in June 2013. The two matters proceeded to a joint sentencing hearing.

¶7 J.R.-R. spoke to the court at sentencing with the assistance of a Spanish-language interpreter. She said:

[f]rom what I understand, the guy said that he did not have a gun. But that is not true. He did have a gun, and he knew exactly what he was there for, because he actually received a phone call while he had the gun pointed at me and my children; and he told the person on the phone that ... the person they were looking for was not there....

And I just wanted to be clear that he did have a gun, and he knew what he was there for; and also because of the damage that has been caused to my daughters because they're still afraid. They still wake up at night crying because of the damage of having the gun pointed at them, and they ask, "mom, why and who wanted to kill us?"

....

I just hope that the time he spend[s] in jail ... will help him realize his wrongs and to never forget the face of my daughters when they looked at him while he was pointing the gun at them.

R.C. spoke next and said:

I was watching TV when these three guys approached me first at gunpoint. They all pointed at me—all three guys with firearms.... All of them were carrying guns.... They were asking where was [sic] the drugs. They told me that they came from a cartel from LaJara and they said they were not messing around, just to give them the drugs and they won't hurt me or whoever else was in the house.

¶8 Next, trial counsel spoke on Hernandez's behalf. Counsel clarified that Hernandez is "not part of any cartel" but did not otherwise directly challenge the remarks that J.R.-R. and R.C. made to the circuit court. Instead, counsel emphasized that Hernandez was very young and had accepted responsibility by pleading guilty. Counsel also addressed aspects of the presentence investigation report, particularly the author's "remarks on [Hernandez's] lack of empathy," and counsel reminded the circuit court that the author "doesn't necessar[il]y perceive [Hernandez] as a callous person or hard, just an immature person."

¶9 The circuit court discussed numerous sentencing considerations, noting the primary importance of the nature of the offenses, the protection of the community, and Hernandez's character. The circuit court determined that the armed burglary was the more serious of the two crimes Hernandez had committed, and the circuit court particularly emphasized that the burglary victims continued to

suffer from the terror they experienced during the incident. The circuit court went on to say it “didn’t believe [Hernandez] was unarmed in this case” and “d[id]n’t find anything incredible about the two statements that were made by the victims in this case.” Ultimately, the circuit court imposed an evenly bifurcated four-year sentence for possessing an electronic weapon and a concurrent, evenly bifurcated fourteen-year sentence for armed burglary.

¶10 Hernandez filed a postconviction motion in both cases claiming his trial counsel was ineffective at sentencing for failing to challenge J.R.-R.’s statements. Noting the circuit court’s finding that the victims were credible, he argued that “there was a very specific reason to doubt the credibility of [J.R.-R.’s] sentencing remarks: they were inconsistent with her prior statements.” In support, Hernandez filed the two police reports we have summarized above. He directed the circuit court’s attention to J.R.-R.’s reported statement that he told her “not to worry, he wasn’t going to hurt her or her babies,” and he emphasized that neither police report includes a statement from J.R.-R. that Hernandez was armed.¹ According to Hernandez, trial counsel’s failure to impeach J.R.-R. with the police reports denied him mitigating evidence at sentencing because, he said, the reports show that he did not carry a gun during the burglary and that he “attempted to calm the situation by telling [J.R.-R.] that no one was going to get hurt.”

¶11 The circuit court denied the requested relief without a hearing, concluding that the alleged discrepancies in J.R.-R.’s statements did not affect

¹ We observe that, although J.R.-R. spoke through a Spanish-language interpreter at sentencing and told the presentence investigator that “her English is not adequate to describe her feelings,” nothing in the police reports indicates the police interviewed J.R.-R. in Spanish or with the assistance of an interpreter.

either victim's credibility and would not have resulted in different sentences. Hernandez appeals.²

DISCUSSION

¶12 Hernandez claims his trial counsel was ineffective at sentencing, and the circuit court erred by denying him a hearing on this claim. A defendant who claims trial counsel was ineffective must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). To prove deficient performance, the defendant must show that counsel's actions or omissions were "professionally unreasonable." *See Strickland*, 466 U.S. at 691. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reviewing court may begin its analysis by examining either of the two *Strickland* prongs and, if a defendant fails to satisfy one component of the analysis, the court need not consider the other. *See id.*, 466 U.S. at 697.

¶13 A defendant is not automatically entitled to a hearing upon filing a postconviction motion. A circuit court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to

² Hernandez's claim for relief is grounded in events relating to the sentence imposed for the armed burglary conviction in case No. 2013CF3377. Hernandez describes his appeal in case No. 2013CF2641 as a "tag along," explaining that, in his view, any resentencing ordered in that case should encompass the second case resolved at the joint sentencing proceeding.

relief. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This determination is another question of law for our independent review. *Id.* If, however, the defendant does not allege sufficient material facts that, if true, entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. *Id.* We review a circuit court’s discretionary decisions with deference. *Id.*

¶14 The circuit court in this case did not reach *Strickland*’s performance prong because the court concluded that Hernandez failed to show prejudice from any alleged deficiency and therefore denied him relief. Nonetheless, because an evaluation of the performance prong is a question of law, we consider the question here.

¶15 Preliminarily, we reject Hernandez’s assertion that we cannot assess trial counsel’s performance absent a hearing to determine counsel’s subjective reasons for not introducing the police reports at sentencing. In fact, a hearing is not always necessary to complete review of the *Strickland* performance prong. *See Allen*, 274 Wis. 2d 568, ¶9. “[T]he test for whether counsel’s performance was deficient is objective, not subjective.” *State v. Carlson*, 2014 WI App 124, ¶30, 359 Wis. 2d 123, 857 N.W.2d 446 (internal citation omitted). On appeal, we “determine whether defense counsel’s performance was objectively reasonable according to prevailing professional norms.” *State v. Kimbrough*, 2001 WI App 138, ¶31, 246 Wis. 2d 648, 630 N.W.2d 752. Our inquiry in this case is thus whether, “considering all of the circumstances, [counsel’s] decision[s] would have been reasonable if defense counsel had made [them] for strategic reasons.” *Id.*

¶16 Hernandez first contends his trial counsel should have challenged J.R.-R.'s statements at sentencing that Hernandez had a gun. In his view, trial counsel should have contrasted those statements with the absence of such statements from the police reports that describe what J.R.-R. said to the investigating officers. Hernandez maintains this contrast would have showed that J.R.-R. "misrememb[ered]" his role in the burglary and "would have taken the gun out of his hands."

¶17 We conclude counsel was objectively reasonable by not producing the police reports in response to J.R.-R.'s emphatic assertions at sentencing that Hernandez carried a gun during the burglary. Although Hernandez claims the police reports contradict J.R.-R. by showing "he did not possess or point a gun at her or her children," that is not the case. Rather, the police reports are silent as to whether J.R.-R. witnessed a weapon in the hands of the intruder matching Hernandez's physical description. As the circuit court observed in its postconviction decision, "[o]nly one person affirmatively states the defendant did not have a gun—the defendant himself."

¶18 Moreover, and significantly, the police report describing statements the victims made at the scene includes R.C.'s explicit accusations that all of the intruders carried guns, pointed them at the victims, and demanded drugs and cash. Thus, had Hernandez offered the police reports at sentencing, he would have not only failed to provide exculpatory statements from J.R.-R., but he would have also risked reinforcing R.C.'s sentencing remarks describing Hernandez as armed and threatening. Avoiding that risk is objectively reasonable.

¶19 Hernandez next claims his trial counsel performed deficiently by not using the police reports to refute J.R.-R.'s contention at sentencing that he caused

her children fear and anxiety. He argues his trial counsel should have pointed to the police reports to show that J.R.-R. in fact reported he “attempted to calm the situation by telling [her] that no one was going to be hurt” during the burglary. He claims the reports would have demonstrated that J.R.-R. had “forgotten the specifics of the burglary” and that, during the crime, she viewed him as “reassuring” and as “offering support to the victims.” Again, however, we conclude counsel was objectively reasonable in not offering such arguments.

¶20 A defendant’s showing of remorse is a key factor for a sentencing court’s consideration. *See State v. Evers*, 139 Wis. 2d 424, 451, 407 N.W.2d 256 (1987). Trial counsel therefore faces a difficult sentencing challenge when a defendant who has pled guilty makes statements during the presentence investigation reflecting a lack of remorse, because such statements undermine the favorable impact of the plea. *Cf. Carlson*, 359 Wis. 2d 123, ¶39. Trial counsel faced that challenge here. The author of the presentence investigation report opined that Hernandez “did not appear to demonstrate any sincere empathy for the victims or how his actions may have impacted them,” and counsel took steps at sentencing to minimize the damaged cause by that opinion. In this context, counsel acted well within professional norms by foregoing an argument that J.R.-R. had forgotten Hernandez was “reassuring” during a late-night home invasion because he told her not to worry while he ransacked her closet and pawed through her purse. Such an argument presents an obvious risk of heightening the impression that Hernandez lacked empathy and failed to understand the effect of his actions. Accordingly, we conclude as a matter of law that omitting the police reports from the sentencing presentation was not deficient performance within the meaning of *Strickland*.

¶21 We also agree with the circuit court that Hernandez did not show prejudice from any alleged deficiency in foregoing use of the police reports to challenge J.R.-R's credibility at sentencing. As we have seen, Hernandez claims he was prejudiced because the circuit court found the victims credible at trial but, in Hernandez's view, the police reports provide a basis to doubt J.R.-R.'s credibility. In resolving Hernandez's postconviction motion, however, the circuit court found that the victims' credibility was unaffected by the police reports on which Hernandez relies. In light of that finding, the circuit court concluded it would not have sentenced Hernandez differently if trial counsel had produced the police reports at the sentencing hearing. Accordingly, Hernandez suffered no prejudice from the alleged deficiency. *See State v. Giebel*, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995) (no prejudice from alleged deficiency where circuit court found it would not have given a different sentence had trial counsel taken different action).

¶22 Hernandez asks us to discount the circuit court's conclusion that he would have received the same sentences even if trial counsel had performed differently. In support, he cites *State v. Smith*, 207 Wis. 2d 258, 558 N.W.2d 379 (1997), and *State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491. Neither case is on point.

¶23 In *Smith*, our supreme court deemed irrelevant the circuit court's assessment of what a sentencing judge would have done but for the prosecutor's breach of a plea bargain. *Id.*, 207 Wis. 2d at 280. Hernandez implies *Smith* renders irrelevant the circuit court's assessment here that the police reports would not have affected the sentencing decision. Hernandez is wrong. When a prosecutor materially and substantially breaches a plea bargain, the breach "always results in prejudice to the defendant." *Id.* at 281. Accordingly, when—as

in *Smith*—the defendant proves such a breach, there is no need to determine what the sentencing judge would have done in the face of an objection to that breach. *See id.* The breach alone prejudices the defendant. *See id.* at 282. In this case, by contrast, no presumption of prejudice exists. *Cf. State v. Burton*, 2013 WI 61, ¶49, 349 Wis. 2d 1, 832 N.W.2d 611 (stating the general rule that a defendant claiming ineffective of assistance of counsel cannot presume prejudice). Indeed, Hernandez acknowledges he must prove prejudice to prevail. *Smith* therefore does not aid him.

¶24 *Travis* similarly provides no guidance. The *Travis* court observed that a circuit court’s after-the-fact statement of non-reliance on inaccurate information at sentencing is not dispositive and that a reviewing court must independently determine the existence of any actual reliance. *See id.*, 347 Wis. 2d 142, ¶48. Hernandez, however, does not argue—let alone show—that the circuit court relied on inaccurate information at his sentencing. Rather, Hernandez maintains that his trial counsel omitted information that would have adversely affected a victim’s credibility. Credibility assessments rest with the circuit court, not with us. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (“trial judge is the ultimate arbiter of the credibility of the witnesses”).

¶25 The judge that sentenced Hernandez was the same judge that considered his postconviction motion, and that judge was ideally positioned to determine whether J.R.-R.’s credibility was undermined by the police reports Hernandez relied on in support of his postconviction claim. The judge determined that neither victim’s credibility was adversely affected by the reports. We are bound by the circuit court’s credibility findings. *See State v. Ayala*, 2011 WI App 6, ¶10, 331 Wis. 2d 171, 793 N.W.2d 511.

¶26 Hernandez thus shows no prejudice from his trial counsel's alleged deficiency at sentencing in failing to use the police reports as a basis for a credibility challenge. The reports would not have undermined J.R.-R.'s credibility if produced at sentencing any more than they undermined her credibility when produced in the postconviction proceedings. Hernandez therefore fails as a matter of law to show a reasonable probability that, but for the alleged deficiency, he would have received different sentences. Accordingly, the circuit court properly rejected his ineffective assistance of counsel claim without a hearing. *See Allen*, 274 Wis. 2d 568, ¶9.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.(2013-14).

